

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 22, 2005 Session

WAYNE MICHAEL FULLER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Morgan County
No. 8999 E. Eugene Eblen, Judge

No. E2004-01642-CCA-R3-HC - Filed July 14, 2005

The petitioner, Wayne Michael Fuller, stands convicted of seven counts of statutory rape, Tenn. Code Ann. § 39-13-506 (1997), and one count of contributing to the delinquency of a minor, *id.* § 37-1-156, for which he is serving an effective 10-year sentence. The petitioner challenged his sentences on direct appeal, and this court found that the petitioner's sentences were validly imposed. *See State v. Wayne Michael Fuller*, No. E1999-01676-CCA-R3-CD (Tenn. Crim. App., Knoxville, Aug. 16, 2000). The petitioner subsequently filed a petition for writ of *habeas corpus*, and after conducting an evidentiary hearing, the *habeas corpus* court denied the petition. Accordingly, the petitioner now brings the instant appeal of the denial of his petition, and for the reasons set forth below, we affirm the judgment of the lower court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Joe H. Walker, District Public Defender; and Walter B. Johnson, II, Assistant District Public Defender, for the Appellant, Wayne Michael Fuller.

Paul G. Summers, Attorney General & Reporter; John H. Bledsoe, Assistant Attorney General; J. Scott McCluen, District Attorney General; and Frank A. Harvey, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The petitioner pleaded guilty to seven counts of statutory rape and one count of contributing to the delinquency of a minor. The trial court imposed two-year sentences for each of the petitioner's seven statutory rape convictions and an 11-month, 29-day sentence for his contribution to the delinquency of a minor conviction. The court ordered the petitioner to serve five of his two-year statutory rape convictions consecutively and ordered the remaining sentences to run

concurrently, for an effective 10-year sentence. In his *habeas corpus* petition and in the instant appeal, the petitioner challenges his sentences as improperly imposed, arguing that the trial court erroneously failed to consider any aggravating factors when determining whether the petitioner's sentences should be served concurrently or consecutively.¹ We hold that the instant *habeas corpus* challenge lacks merit and accordingly affirm the judgment of the lower court.

“[T]he writ of [*habeas corpus*] will issue in Tennessee only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired.” *State v. Ritchie*, 20 S.W.3d 624, 630 (Tenn. 2000) (quoting *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993)). “A void judgment is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.” *Taylor v. State*, 955 S.W.2d 78, 83 (Tenn. 1999). In contrast, “[a] voidable conviction or sentence is one which is facially valid and requires the introduction of proof beyond the face of the record or judgment to establish its invalidity.” *Ritchie*, 20 S.W.3d at 630 (quoting *Taylor*, 955 S.W.2d at 83). Facial invalidity means that the “fact [depriving the court of jurisdiction] must appear clearly and indisputably either on the face of the judgment or in the original trial record before a writ of habeas corpus can issue from a Tennessee court.” *Id.* at 633.

The burden is on the petitioner to establish that the judgment is void or that the sentence has expired. *State ex rel. Kuntz v. Bomar*, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). A petition seeking issuance of a writ of *habeas corpus* may be summarily dismissed by a trial court if it fails to indicate that the petitioner's conviction is void. Tenn. Code Ann. § 29-21-109 (2000).

In the instant case, the petitioner asserts that the trial court erroneously failed to comply with the requirements of Tennessee Code Annotated section 40-35-115(b)(5), which instructs that

(b) The court may order sentences to run
consecutively if the court finds by a preponderance of
the evidence that:

. . . .

(5) The defendant is convicted of two (2) or more statutory
offenses involving sexual abuse of a minor with consideration of the

¹ In the evidentiary hearing held by the *habeas corpus* court, the petitioner was the sole witness, and he testified that the trial court failed to consider any aggravating factors when determining if he should serve his sentences consecutively or concurrently. The petitioner cited a Tennessee statute and case law that instructs trial courts to consider certain aggravating factors when making this determination. See Tenn. Code Ann. § 40-35-115(b)(5) (2003); *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999).

aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

Tenn. Code Ann. § 40-35-115(b)(5) (2003). The petitioner alleges that the record of his sentencing hearing reflects that the court failed to consider any criteria other than that he had been convicted of two or more statutory offenses involving the sexual abuse of a minor. The petitioner avers that because the court failed to comply with this statutory requirement, his sentence is illegal and therefore void, entitling him to *habeas corpus* relief. The state counters that the petitioner has failed to establish that his convictions are void and that he is merely attacking his manner of service, which is not an appropriate basis upon which to grant *habeas corpus* relief.

We find that the petitioner has failed to establish that he is entitled to *habeas corpus* relief. The petitioner challenged his consecutive sentences on direct appeal, and this court found that “the trial judge was well within his statutory authority and duty to impose consecutive sentences in this case.” *Wayne Michael Fuller*, slip op. at 6-7. Specifically, this court cited several bases that support the court's sentencing determination: The victim was 30 years the petitioner's junior, the sexual relationship occurred undetected for three months, the petitioner had traveled from Florida to Tennessee “to engage in cunnilingus, fellatio, and digital penetration of a minor,” and the trial judge ran only five of the petitioner's seven statutory rape conviction sentences consecutively. *Id.* More importantly for purposes of the current proceeding, we hold that the trial court's claimed failure to engage in the statutorily required analysis of relevant aggravating factors would not render the judgment void and would not, therefore, give rise to *habeas corpus* relief.

Thus, the judgment of the lower court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE